Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Pertaining to the Regulation of Cellular Carriers	)	RM No. 8179

REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Cellular Telecommunications
Industry Association

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Dated: April 5, 1993

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The Cellular Telecommunications Industry Association ("CTIA") hereby submits its Reply Comments in response to the Comments filed by the National Cellular Resellers Association ("NCRA"), the only party opposing CTIA's Request for Declaratory Ruling and Petition for Rulemaking ("CTIA Petition"). [1/]

INTRODUCTION AND SUMMARY

In this proceeding, CTIA requests a declaratory ruling reaffirming long-standing Commission rulings that cellular services are predominantly intrastate in nature and therefore not subject to federal tariffing pursuant to Section 221(b) of the Communications Act of 1934, where those services are "subject to"

1/ The Comments of the United States Telephone Association ("USTA") ask the FCC to stay consideration of the CTIA Petition until a comprehensive review of all telecommunications industries is undertaken. USTA Comments at 2-5. USTA has not attempted to make the necessary showing for grant of a stay. CTIA's Petition was filed in conformance with the procedures set forth by the Commission for carriers seeking a nondominant classification. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 FCC 2d 554, 582 (1983). USTA's quarrel is with these policies and procedures, not CTIA's Petition. Immediate relief is needed by the cellular industry. If USTA believes that other exchange carriers are entitled to nondominant status, it should initiate a proceeding pursuant to the standards set forth in the Fourth Report and Order or petition to change those standards.

state regulation. There are, in fact, few instances where cellular carriers offer pure interstate services. In most of

- NCRA has not shown that cellular carriers have the ability to control prices or output in any market;

- NCRA has not rebutted CTIA's showing that the cellular industry faces competition from other technologies;

- NCRA has failed to show that the cellular industry's return on investment is out-of-line with other new and evolving high-technology industries; and

- NCRA has failed to demonstrate that requiring tariffs is likely to remedy NCRA's alleged problems.

I. NCRA HAS NOT RAISED ANY SERIOUS CHALLENGE TO COMMISSION PRECEDENT APPLYING SECTION 221(b) TO CELLULAR

In keeping with the overall state/federal jurisdictional dichotomy imposed by the Act, Section 221(b) reserves to the states jurisdiction over the charges for exchange services, even though a portion of such service may constitute interstate communications, where the service is subject to regulation by the relevant state regulatory commission. CTIA has submitted in its Petition that where cellular exchange-type services fall within the scope of this statutory provision, they are not subject to federal tariffing under Section 203(a).

NCRA contends, however, that Section 221(b) applies to cellular operations, "only in a limited manner if at all," [3/]

[3/] NCRA Comments at 8. On the other hand, some commenters take the position that CTIA's proposed construction of Section 221(b) is too restrictive. For example, two parties argue that Section 221(b) applies to supersystems covering several states. See Comments of GTE Mobile Communications at 24 and Century Cellunet, Inc. at 6. New Par argues that Section 221(b) would apply regardless of whether the relevant state regulatory commission is empowered to regulate cellular. See New Par Comments at 4-11.

arguing that Section 221(b) applies only to communications that occur within a single telephone exchange established by state regulators that happens to overlap state lines. [4/] This contention ignores an unbroken line of Commission precedent

overwhelming percentage of cellular calls are completed within the MSA or RSA of origination. [8/] NCRA does not dispute these facts.

Moreover, when the Commission decided to use Metropolitan Statistical Areas ("MSAs") to define the geographic boundaries for cellular license applications, it modified certain MSAs in order to have service more closely aligned with actual mobile service marketing areas. [9/] Many of these "modified MSAs" covered areas which encompassed portions of more than one state. MSA No. 1, for example, included sections of New York and New Jersey, and MSA No. 8 encompassed all of the District of Columbia, as well as portions of Maryland and Virginia. [10/] In the same decision in which the Commission created these multi-state MSAs, it also expressly reserved to the states jurisdiction over cellular service rates, citing Section 221(b). [11/] These simultaneous actions evidence an acknowledgement by the Commission that service within multi-state MSAs is activity governed by Section 221(b). The Commission recently reiterated

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[7/](...continued)
Commerce, Office of Federal Statistical Policy and Standards, MSA Classification, Notice of Final Standards, 45 Fed. Reg. 956 (Jan. 3, 1980). Thus, the general concept of an MSA is one of a close-knit economic and social center concentrated in a limited geographic area.

[8/] CTIA Petition at 7.

[9/] See 47 C.F.R. § 22.903(e).

[10/] Other multi-state MSAs included MSA No. 11 (Missouri/ Illinois); No. 15 (Minnesota/Wisconsin); No. 23 (Ohio, Kentucky, Indiana); No. 24 (Missouri/Kansas); and No. 30 (Oregon/ Washington).

[11/] See Cellular Communications Systems, 89 FCC 2d at 86-89, 96 (1982).

this position when it observed that "[a]t least initially, cellular systems only provided intrastate common carrier services." [12/]

Thus, NCRA mounts no serious challenge to CTIA's assertion that Section 221(b) governs the exchange-type services provided by cellular carriers that are "subject to" state regulation. [13/] The Commission should therefore declare that no federal tariffs are required for such services. [14/]

II. THE COMMUNICATIONS ACT DOES NOT REQUIRE THE FILING OF TARIFFS FOR JURISDICTIONALLY MIXED CELLULAR

Communications Act [15] to file FCC tariffs covering virtually all cellular service charges, including airtime charges and roamer fees, because all cellular systems provide access to interstate communications. [16] NCRA's argument seriously misconstrues the AT&T decision, Section 203(a), and a large body of case law interpreting the intersection of federal and state jurisdiction.

The AT&T decision held only that Section 203(a) requires the filing of tariffs for interstate common carrier services. [17] It did not address or affect the considerably more complex issue of jurisdictionally mixed services, which involve both intrastate and interstate communications. The charges for jurisdictionally-mixed, dual-use services and facilities were not before the court.

A substantial body of case law addresses the regulatory treatment of jurisdictionally mixed services and facilities. These decisions provide guidance for reconciling the conflict between the FCC's exclusive jurisdiction over interstate service with the Communications Act's specific reservation of exclusive

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15/ 47 U.S.C. § 203(a).

16/ NCRA Comments at 3-8.

17/ [redacted]

state jurisdiction over intrastate service with respect to services that are both intrastate and interstate in nature. In essence, the cases hold that the Commission has the authority, but not the obligation, to impose federal regulation on a jurisdictionally mixed service that is not readily severed into interstate and intrastate components – but there must be a valid federal purpose for such regulation. The AT&T decision did not overrule this body of case law.

Cellular systems do not provide the exclusively interstate service that was at issue in AT&T. Cellular service is predominantly local and intrastate in nature, and only incidentally a jurisdictionally mixed service. The Commission has so found and declined to regulate cellular rates.

Thus, the narrow issue before the FCC in this proceeding is whether the AT&T decision makes mandatory the filing of FCC tariffs for jurisdictionally mixed cellular service – an interpretation which would displace the FCC's policy of deferring to the states. As CTIA demonstrates below, the AT&T decision does not require cellular carriers to file interstate tariffs for jurisdictionally mixed service.

A. The FCC Shares Jurisdiction With the States over Jurisdictionally Mixed Cellular Service

Cellular carriers provide a service that allows customers [18/] to make and receive both local calls and long-distance calls using microwave radio transmissions. For this

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[18/] Cellular carriers provide service to their "home" customers, and to "roamers." A roamer is a cellular subscriber who temporarily uses a cellular system other than its "home" system.

radio network service, cellular carriers charge customers a combination of fixed and usage-sensitive charges that apply to both incoming and outgoing calls. If the customer uses the radio network to place a long-distance call, the customer pays the cellular carrier its rate for use of the radio network ("airtime") and a separate toll charge for the interexchange service. [19/]

After AT&T, cellular carriers must tariff the toll charges for interstate long-distance calls that they provide (or resell) to their customers. Indeed, this is the holding of AT&T. But, NCRA argues that AT&T requires a cellular carrier to file a federal tariff for all of its radio network charges. These airtime charges are not imposed specifically and solely on interstate calls, and are not, therefore, rates for interstate service in particular. Cellular carriers impose airtime charges

local and long-distance calling. [20/] These services are thus jurisdictionally mixed.

It is well-established that communications services and facilities providing both intrastate and interstate communications are subject to both federal and state regulatory jurisdiction. [21/] Indeed, virtually all switched local telecommunications services, and the facilities used to provide such services, are subject to both federal and state jurisdiction. [22/]

[20/] Whether a given cellular telephone call is jurisdictionally intrastate or interstate may not be determinable in some cases. First, a cellular system is not able to determine with precision the location of a mobile subscriber when a call is initiated or

Services that have both interstate and intrastate characteristics create tension between federal and state jurisdiction. [23] Sections 1 and 2(a) of the Communications Act [24] give the FCC jurisdiction over interstate communications services, and Title II of the Act [25] provides for regulation of interstate common carrier service. At the same time, however, Section 2(b) of the Act denies the FCC jurisdiction over intrastate services:

> [N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. [26]

Where the same facilities are used to provide, or to access, both intrastate and interstate services, the FCC must

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[22] (...continued)
realities of technology and economics belie such a clean parceling of responsibility.

seek to reconcile its jurisdiction with that of the states. NCRA would have the Commission believe that the mere fact that a given service involves interstate and intrastate aspects automatically results in the exercise of federal jurisdiction. This is simply not true.

B. FCC Regulation of Jurisdictionally Mixed Services Is Unwarranted When Interstate Communications Are Not Substantially Affected

The Supreme Court has held that the Communications Act's expression of federal authority over interstate communications and its reservation of state authority over intrastate communications should, "where possible, . . . be read so as not to create a conflict." [27/] While state authority may be preempted "to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the FCC may not simply "take action which it thinks will best effectuate a federal policy." [28/] Thus, Section 2(b) has been held to "deprive the [FCC] of regulatory power over local facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications." [29/] On the other side of the issue, Section 2(b) does not permit "state regulation, formally restrictive only of intrastate communication, that in

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27/ Louisiana PSC, 476 U.S. at 370.

28/ Id. at 374.

29/ NCUC I, 537 F.2d at 793.

effect encroaches substantially upon the Commission's authority." [30]

Where separation is not possible, "the Act sanctions federal regulation of the entire subject matter (which may include preemption of inconsistent state regulation) if necessary to fulfill a valid federal regulatory objective." [31] While depreciation regulation can be severed, terminal equipment interconnection policy cannot: because the same terminal equipment is used interchangeably for both intrastate and interstate service, the courts have held that policies affecting the interconnection of telephone equipment cannot be severed between the FCC and the states. [32]

It is the imposition of special charges for interstate communications that do not apply to intrastate communications that calls FCC jurisdiction into play. In New York Telephone Co. v. FCC, [33] the imposition of a special surcharge on physically intrastate local exchange facilities used for interstate communications, but not on those used for intrastate communications, was held to substantially affect interstate

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[30] Id.

[31] Illinois Bell Telephone Co. v. FCC, 883 F.2d 104, 115 (D.C. Cir. 1989) (emphasis supplied).

[32] NCUC I, 537 F.2d at 793; North Carolina Utilities Commission v. FCC, 552 F.2d 1036, 1046-47 (4th Cir.), cert. denied, 434 U.S. 874 (1977) (NCUC II) (state policy would substantially impede the FCC's valid objective of allowing interconnection of subscriber-owned equipment).

[33] 631 F.2d 1059 (2d Cir. 1980).

communications, authorizing the FCC to exercise Title II regulation of such facilities. [34/]

These cases do not, however, mean that the FCC must assert or exercise plenary jurisdiction over all physically intrastate exchange services used for interstate communications. Diamond International Corp. v. FCC [35/] addresses this point. In that case, the FCC had allowed state, rather than federal, tariffs to govern the rates charged for certain jurisdictionally-mixed facilities, even though they were to be used in connection with interstate service. No special surcharge was imposed for the interstate use of the facilities. The court noted that "[w]here state regulation has been deemed to be overly burdensome on interstate communications, the Commission has interceded to protect national communications concerns. . . . The Commission concluded that the instant case did not present the requisite need for Commission intervention in the state regulatory scheme." [36/] The D.C. Circuit upheld the FCC's "decision to refrain from exercising jurisdiction" because the record did not reflect that the charges for the facilities would "substantially affect the conduct or development of interstate communications." [37/]

These cases demonstrate that telecommunications services and facilities used for both intrastate and interstate

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[34/] 631 F.2d at 1065-66.

[35/] 627 F.2d 489 (D.C. Cir. 1980).

[36/] 627 F.2d at 493.

[37/] Id.

communications are not automatically subject to the full panoply of FCC regulation merely because interstate communications is involved, contrary to NCRA's suggestion. Unlike the purely interstate service that is subject to the Section 203(a) tariff requirement under the AT&T opinion, mixed-jurisdiction services provide roles to both the FCC and the states, and these roles must be accommodated to the extent possible.

C. There Is No Substantial Reason to Require Tariff Filings for Jurisdictionally Mixed Cellular Service

The FCC has long held that cellular service, while jurisdictionally mixed, is essentially local in nature and has deferred to state regulation of the rates charged for cellular service. In authorizing cellular service, the FCC engaged in a delicate balance between federal and state concerns, holding that it was necessary to preempt certain aspects of state regulation in order to maintain the integrity of its licensing scheme – specifically, market structure, technical standards and need for service. [38/]

At the same time, however, the Commission acknowledged "the states' interest in continuing their complementary role in the regulation of cellular service." [39/] The Commission accordingly declined to extend its jurisdiction any farther than necessary to achieve its licensing goals, stating that it was reserving "to the states jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations

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[38/] Cellular Communications Systems, 86 FCC 2d 469, 503-04, 493-95, 510-11 (1981), recon., 89 FCC 2d 58, 94-96 (1982).

[39/] 89 FCC 2d at 94.

for service by licensed carriers." [40/] Consistent with this policy, the Commission concluded in its Access Charge proceeding that cellular carriers and other providers of wireless mobile common carrier service are not interexchange carriers, but are local service providers instead:

> The RCCs provide "exchange service" under Sections 2(b) and 221(b) of the Communications Act, and we have consistently treated the mobile radio services provided by RCCs and telephone companies as local in nature. See, e.g., FCC Policy Regarding

use of the local cellular service provider's jurisdictionally mixed network, and not specifically for interstate calling; there are no "rates" or "charges" for interstate communications that would require tariffs to be filed pursuant to Section 203(a) of the Act. [42/]

Moreover, there is no evidence that cellular licensees have any substantial effect on the volume, price, or level of competition in interstate communications. The Commission itself has disclaimed any federal policy requiring FCC regulation of cellular rates, facilities, or services. This is consistent with the Diamond International case discussed above; accordingly, a cellular carrier's local service rates [43/] should apply to ..

service area extends over several states. While in a wide-area multi-state system some of the radio network service offered by the cellular carrier might arguably extend beyond an "exchange area" for purposes of Section 221(b), the service is nevertheless jurisdictionally mixed and the Commission should refrain from deeming the service interstate in nature. To the extent cellular service is offered to users for standard airtime and monthly or daily charges, the Commission may properly conclude that the portion of such service that is technically interstate is sufficiently intertwined with the intrastate and local portions of such service as to justify deferral to state regulation of the service, absent a substantial reason for invoking federal jurisdiction.

III. CELLULAR CARRIERS SHOULD BE CLASSIFIED NONDOMINANT

A. NCRA Has Addressed the Wrong Market

NCRA challenges CTIA's request that cellular carriers be declared "nondominant." Pointing to alleged competitive failings in the cellular duopoly structure, NCRA claims that competition in the cellular industry is "marginal, at best" [44/] and that cellular licensees possess "substantial market

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[44/] NCRA Comments at 14-26.

power." [45] These arguments are not only inaccurate, [46] more importantly, they are beside the point.

The proper focus of this inquiry, as recently articulated by the Commission, is an "examination of the competitiveness of cellular service in the interstate communications market." [47] NCRA does not even attempt to demonstrate that cellular carriers are in a position to exercise market power in the interstate telecommunications arena. In fact, it could not make such a showing. The Commission has determined that the market for interexchange telecommunications services is marked by "robust competition," [48] and it has labeled all interexchange carriers (except AT&T) "nondominant." [49] If interexchange carriers the size of MCI are not in a position to exercise market power, surely cellular carriers are in no position to do so. [50] Moreover, the cellular carriers that do

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[45] Id. at 15.

[46] See discussion at 20-24, infra. See also Testimony of Cheryl A. Tritt, Chief, Common Carrier Bureau, Before the Senate Committee on Energy and Public Utilities, California Legislature (January 12, 1993) at p. 2 ("With this duopoly market firmly established, the cellular industry has seen strong and steady growth, burgeoning demand, competition based on price and service, and continued improvement in service quality and coverage.").

[47] Waiver Order at ¶ 5 (emphasis added). The relevant analysis is cellular's role in the interstate market because only interstate services are arguably subject to the Section 203(a)

engage in interstate services do so primarily through the resale of other carriers' interexchange services. Cellular carrier resale of interexchange services is already considered a nondominant activity [51] – a finding NCRA does not challenge.

B. Cellular Carriers Do Not Possess "Market Power" In Any Market

NCRA's arguments in support of its claim that cellular carriers possess market power in their provision of exchange-type services are without merit. A carrier is considered dominant if it is found to possess "market power (i.e., power to

the past 12 months. [55/] The latest statistics reveal that the industry added 3.5 million new cellular subscribers in 1992. Of the new subscribers, 2.1 million signed up in the last six months alone, substantially surpassing the record for any prior six-month period. [56/] The number of cellular subscribers is projected to be 19 million by 1995 and 39 million by 2001. [57/]

Moreover, cellular licensees continue to invest substantial sums to build out their systems at an ambitious pace, and they are in the process of introducing new technologies that

NCRA claims in this regard that certain cellular carries have operating margins in excess of 40%, [58/] but it fails to mention that the same data reveal that many cellular carriers show much lower margins. [59/] Moreover, operating margins in the 40% range are not inconsistent with the figures for other, non-cellular, high technology companies in fiercely competitive industries. [60/] Indeed, a high operating margin may be critical to success in a field characterized by rapid growth and rapidly changing technology.

NCRA also contends that evidence of high cost-price margins can be found in the high prices paid by investors for cellular systems. [61/] In making this argument, however, NCRA ignores the fact that such prices have declined sharply of late, and it focuses only on the more population-concentrated markets. A review of the "per-pop" selling prices of the RSA markets are significantly lower (often below $50 per pop). [62/] NCRA's assertion that cellular properties averaged $131 "per pop" for small systems is clearly in error.

58/ NCRA Comments at 16.

59/ See Donaldson, Lufkin & Jenrette, Spring, 1992, Table 3 statistics for GTE/Contel (25.0%), BellSouth (28.5%), NYNEX (29.1%), Centel (24.1%), TDS/U.S. Cellular (11.4%) and Vanguard Cellular (8.7%) at 12.

60/ Value Line estimates the following five-year operating margins: Adobe Systems (41.2%); Novell (41.5%); Microsoft (39.0%); St. Jude Medical (59.0%).

61/ NCRA Comments at 23.

62/ See "Cellular Investor," October 11 and November 19, 1991, and January 21 and March 16, 1992.

NCRA claims further that there is a "clear absence of declining rates." [63] This statement is incorrect. The nominal price for 250 minutes of prime airtime usage per month across the ten largest cellular service areas had, in 1989, declined by 19 percent from the inception of commercial service in 1983. The unweighted average of the lowest published rate for access and 250 minutes of usage during prime time in these ten service areas was only 85 percent of its 1983 level. When adjusted for inflation, the average of these rates in the ten largest cellular service areas in 1991 was only 62 percent of its 1983 level. [64]

NCRA also attempts to underplay CTIA's claims respecting the substitutability of services, its primary contention being that the Commission should not set current policy based on services that will be introduced in the future. CTIA noted in its Petition that paging and Specialized Mobile Radio ("SMR") services, as well as landline telephone services, provide current alternatives to cellular. The introduction of Enhanced SMR services along with personal communications and mobile satellite services will soon provide additional options. [65] It is not unreasonable for the Commission to take

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[63] NCRA Comments at 19.

[64] Data are from Herschel Shosteck Associates, Ltd., Cellular Market Forecast, Data Flash, September 1992. Moreover, one of the sources the NCRA refers to in support of its argument that prices are not declining, the GAO Report, directly contradicts this assertion: "Average nominal prices for cellular service were roughly consistent between 1985 and 1992, implying a decline in the real (inflation-adjusted) average price of about 27 percent." See GAO Report at 19.

[65] See CTIA Petition at 19.